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IN THE

SUPREME COURT
OF THE UNITED STATES

October Term, 19___

No. 75-234

SUN FIRST NATIONAL BANK OF ORLANDO
and CLIFFORD M. HAMES, VICE
PRESIDENT AND TRUST OFFICER,

Petitioners,

vs.

UNITED STATES OF AMERICA and
EDWARD P. CORY, REVENUE AGENT,
INTERNAL REVENUE SERVICE,

Respondents.

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals
for the Fifth Circuit

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INDEX

	Page
CITATIONS	1
OPINIONS BELOW	4
JURISDICTION	4
QUESTION FOR REVIEW	4
CONSTITUTIONAL AND STATUTORY PROVISIONS	5
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	8
APPENDIX	A-1
CERTIFICATE OF SERVICE	A-17

CITATIONS

	Page
CONSTITUTIONAL PROVISIONS	
United States Constitution, Amendment IV.....	4
FEDERAL STATUTES	
Internal Revenue Code of 1954 § 7602, 26 U.S.C. § 7602.....	4,5
FEDERAL CASES	
United States Supreme Court	
Camara v. Municipal Court, 387 U.S. 523 (1967).....	9
Donaldson v. United States, 400 U.S. 517 (1971).....	8
See v. Seattle, 387 U.S. 541 (1971).....	9
United States v. Bisceglia, ___ U.S. ___, 95 S. Ct. 915, L. ed. 2d 88 (1975).....	8,10,12, 13,14,17
United States v. Powell, 379 U.S. 48 (1964).....	8,11,15
UNITED STATES COURTS OF APPEAL	
United States v. McCarthy, 514 F. 2d 308 (3d Cir. 1975).....	15

CITATIONS
(Con.)

Page

UNITED STATES DISTRICT COURTS

Slocum v. United States, 303 F. Supp. 373 (D. Minn. 1969)..... 15

United States v. Armour, 376 F. Supp. 318 (D. Conn. 1974)..... 15

United States v. Fisher, 352 F. Supp. 731 (E.D. Pa. 1972)..... 15

United States v. Freedman, 388 F. Supp. 963 (W.D. Pa. 1975)..... 15

United States v. Lubus, 370 F. Supp. 695 (D. Conn. 1974)..... 15

MISCELLANEOUS

American Banker, July 10, 1975... 17

CCH Standard Federal Tax Reports Par. 6585 (1975)..... 17

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INTERNAL REVENUE SERVICE,

Respondents.

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals
for the Fifth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on April 5, 1975, an order denying the Petition for Rehearing being entered on May 16, 1975.

OPINIONS BELOW

The opinion of the District Court for the Middle District of Florida (A-1-4) is reported at 374 F. Supp. 1120. The opinion of the Court of Appeals for the Fifth Circuit (A-5-13) is reported at 510 F. 2d 1107.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on April 5, 1975, and a copy thereof is appended to this petition in the Appendix at pp. 5 to 13. An order denying Petition for Rehearing and rehearing en banc was entered May 16, 1975 (A-14). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101.

QUESTION FOR REVIEW

Whether the administrative summons issued by the Internal Revenue Service pursuant to 26 U.S.C. § 7602 may be enforced to compel a fiduciary institution to turn over trust records of taxpayer-customers where the trust records sought were selected on a random sample basis from bank records and at the time of the summons there was no ground to believe any trust had any tax obligation.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The issues in this case involved the Fourth Amendment to the United States Constitution and 28 U.S.C. §§ 7601 and 7602, the text of which are set forth in the Appendix, pages 15 and 16.

STATEMENT OF THE CASE

In 1973, the IRS began an audit of the consolidated tax returns of First at Orlando Corporation, A-2,6 * now known as the Sun Bank of Florida, Inc., a multi-bank holding company whose assets exceed 1.7 billion dollars. In the course of this audit, the IRS demanded and was given access to records of Petitioner Bank, a member of the holding company. In the course of the audit, the agents sought records relating to the operation of the Trust Department. Many records of the Department were produced, including those concerning the operation of the various common trust funds, fees collected and charged and others which concerned operations conducted by the Bank itself. (A-7). Among the records sought by and produced to the agents were the minutes of meetings of the Trust Committee. (A-7). From this record, the IRS agents extracted the names of some 150 trusts. A random selection of

* The citations herein are "TR" to the transcript of the proceedings below and "A" to the Appendix attached.

32 of the 150 was made. The agents then requested the Form 1041 tax return for each of the 32 trusts. Having no knowledge at the time of the request of an ongoing inquiry as to any of the trusts and being aware that the returns were available to the Government through its own records, the Bank declined the request. The agent in charge then "became suspicious" because the Bank refused his request, and determined to conduct an audit of the 32 trusts. (TR. 27-30) The single operative occurrence which triggered the "audit" and summons was the refusal of the Bank to turn over the tax returns, records irrelevant to the stated purpose of the audit and records which were already in the Government's possession. Although no other investigatory steps to audit the trusts had been undertaken (TR. 15, 25, 31), the following blanket summons was issued directed to the Bank concerning all 32 trusts:

"As to each of the Trusts set forth on the attached list for which the bank has fiduciary responsibilities, the retained copy of Form 1041 (Fiduciary Income Tax Return) filed by the bank as trustee for the years 1970 and 1971; the trust declaration or instrument establishing or creating the trust; all records of income and disbursements of each trust; records in connection with the investment of trust funds; records of assets contributed to the trust; your Trust Committee minutes relevant to each trust; and the Employer Identification Number of each of the trusts."

(Appended were the names and trust numbers of 32 trusts randomly selected from the minutes of the Trust Committee)

The Bank declined to comply with the summons and the IRS sought enforcement in the U.S. Federal District Court, Middle District, Florida. At the hearing, it further appeared throughout the testimony of the agent in charge of the audit that the motivating purpose for seeking the records of the individual trusts was to determine if the excise tax on foreign stock transactions had been paid. (TR. 8-9). The IRS, however, had no information or ground to believe that the tax had not been paid, or indeed, that any such taxable transaction had occurred. (TR. 15, 25, 31).

The District Court ordered the summons enforced, finding that there was a good faith audit as to the trusts underway at the time of the hearing and that the records sought were relevant and material. (A-3-4). The District Court noted, however, that the IRS had not sought to obtain any of the summoned documents from its own files, but instead had looked solely to Petitioner to provide the documents concerning the audit. (TR. 15, 22, 30, 41, 46). The Court of Appeals, Fifth Circuit, affirmed, based on the District Court's determination that there was a "good faith" audit of the trusts underway. (A-13).

REASONS FOR GRANTING THE WRIT

This case squarely presents the question of the nature, extent and sufficiency of the showing which must be made by the Internal Revenue Service in order for it to summon records of a taxpayer in the hands of a third party. The case is further significant because it presents the issue of the Government's right to compel a fiduciary institution to turn over the records of its customers relative to matters of the customer's tax liability at a time when the Government has no reason to believe any taxable incident or transaction of the customer has occurred and when the IRS has the summoned information in its own files. The net result of the IRS' effort in this case is to compel a fiduciary institution to make its customers' records available for Government inspection on a random sample basis.

This Court in the past few years has had several occasions on which to speak to the enforcement of an Internal Revenue summons issued pursuant to 26 U.S.C. Section 7602, most recently in United States v. Bisceglia, ____ U.S. ____, 43 L.Ed.2d 88, 95 S.Ct. 915 (1975). While the recent cases have upheld the enforcement of the summons, 1/ they have never sustained a summons issued to a

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1/ United States v. Powell, 379 U.S. 48 (1964); Donaldson v. United States, 400 U.S. 517 (1971); United States v. Bisceglia, 379 U.S. 48 (1964).

third party where (1) there was no incident or occurrence which triggered a belief a taxable transaction had happened prior to the request for documents; (2) where the only step undertaken in the audit was issuance of the summons; and (3) where the documents summoned were already in the hands of the Government. On the facts of this case, a summons was issued and enforced purely for exploration of a third party's papers. Petitioner submits that the extension of the Internal Revenue Service's summons authority in this case reaches constitutional proportions.

The balance to be struck between the rights of the citizen and the interests of the government has always been difficult in the area of compelled production and inspection of private papers and premises. The development of administrative bodies with the power to summons records and documents has resulted in substantial litigation. This Court has recognized that the administrative summons authority has the potential for abuse and that supervision of its exercise is necessary. See, Camara v. Municipal Court, 387 U.S. 523 (1967) and See v. Seattle, 387 U.S. 541 (1967). While this Court has accepted the view that the criminal law concept of probable cause contained in the Fourth Amendment does not apply to the Section 7602 administrative summons, this Court has answered arguments by the taxpayer that he is without protection from misuse of the summons power by stating, "Substantial protection is afforded by the provision that an Internal Revenue summons commonly is enforced by the courts."

United States v. Bisceglia, _____ U.S. _____, 43 L.Ed.2d 88; 95 S.Ct. 915 (1975).

The Petitioner has sought certiorari because of its strong belief that the "substantial protection" afforded by the courts includes the concept that the Internal Revenue Service cannot compel the production of documents as an exploratory device to canvass for tax responsibility on a random sample basis.

A review of the instant case shows that when the Internal Revenue Service sought to examine the fiduciary records of the Bank, it had no information which would lead it to believe any of the third party taxpayers whose records were sought might be responsible for any tax. (TR 31) The summons in this case was issued in order to explore the records of one taxpayer in the hope of finding tax liability on the part of other taxpayers. The testimony of Cory, the agent in charge of the audit of the Bank holding company, shows that the IRS was exploring the bank records relating to the tax liability of other tax entities, in order to compile a random sample of persons who might or might not be audited. (TR 9,10) Access to bank records was sought and allowed in the context of the bank and its parent company being audited. (TR 7,8) Once the door was opened to this depository of financial data, the IRS had a source of records and lists of other taxpayers (the bank customers) whose only transgression was that they had chosen to engage in business dealings with Petitioner bank. From this source, the IRS made a list of 150 taxpayers and then by random selection narrowed the list to 32.

There was not the slightest suspicion that any of the 32 taxpayers selected from the bank's customer lists had failed in any way to comply with tax laws. (TR 23,25) There was not even any suggestion that any of the trusts had engaged in a taxable transaction. There was simply the request to canvass bank records to see if tax liability with reference to Bank customers might be found.

In ordering enforcement of the summons in this case, the lower Courts went substantially beyond the prior decisions of this Court. The decisions of this Court have consistently recognized that there are strictures on power of the IRS under Section 7602 of the Internal Revenue Code, although the Code itself provides very little in the way of limitation or guidelines. The Code simply says that for the purpose of ascertaining the correctness, accuracy or necessity of a return or for determining tax liability, the Service may summon records relevant to such inquiry. To the statute this Court has engrafted some limitations, most completely set forth in United States v. Powell, 379 U.S. 48 (1964). There, Justice Harlan stated:

> "[The Internal Revenue Service] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not within the Commissioner's possession, and that the administrative steps required by the code have been

followed - in particular that the 'Secretary or his delegate,' after investigation, has determined the further examination to be necessary ... ." At 57-58.

The opinion further notes that it would be an abuse of statutory authority if the issuance of the summons were not "in good faith". Id. at 58. The Court in United States v. Bisceglia, ____ U.S. ____, 43 L.Ed.2d 88; 95 S.Ct. 915 (1975), found elements which showed that a good faith investigation made pursuant to a legitimate purpose was in progress prior to the time the summons was issued. They were:

(1) That the IRS had a reasonable basis for suspicion in initiating the investigation;

(2) That prior to the time the summons was issued there was a definite ongoing audit by the Internal Revenue Service with reference to the taxpayer; and

(3) That the Internal Revenue Service had no other means to identify the taxpayer making these deposits or to investigate the records of such taxpayer except by issuance of the summons. ____ U.S. _____, 43 L.Ed.2d at 91-93,95, 96-97.

Commencing with Powell and continuing through Bisceglia, this Court has consistently required from the Internal Revenue Service a showing that its request for documents was founded on some ongoing investigation of an identified tax liability or tax entity. The present

case is a departure from that principle.

The record shows that when the IRS requested the Form 1041 returns, it had no grounds to believe that any taxable occurrence had happened with respect to the trusts. At the time of this initial request the agent, by his own admission, was engaged in an exploration of records to see what he could find. (TR 8-9) The so-called "audit" of the trusts out of which the summons issued was occasioned by a "suspicion" that there might be some tax liability of the trusts. The "suspicion" was triggered by the refusal of the Bank to provide the records. (TR 31) 2/ The effect of the agent's position, as upheld by the Court below, is to say that a taxpayer does not have to turn over records without protection of a court hearing and order; but if he fails to turn over the records, that in itself constitutes sufficient grounds for the Court to compel that the records be turned over.

Justice Blackmun noted that even the Bisceglia, supra, summons was "issued

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2/ "THE COURT: So, if the retained copies had been given to you as requested, it would appear that then the audit would not have been started as to each of these trusts?

"THE WITNESS: [Internal Revenue Service Agent Cory] I would have to assume ... that that would be true ... ."

pursuant to a general investigation. The Service was not engaged in researching some general problem; its mission was not exploratory." ____U.S. ____, 43 L.Ed.2d at 97. Recognizing that probable cause in the Fourth Amendment sense is not the test and acknowledging the investigatory nature of the IRS function and summons, there must yet be some rational basis upon which the Government bases its right to summon a citizen's documents and records. A random sample is not such a basis.

Not only did the IRS seek use of the summons to explore a third party's papers, but also the predicate laid by the IRS for enforcement in this case is far less than any which has been previously approved. In the most recent case before this Court, Bisceglia, supra, there was a substantial reason to believe that a taxable incident had occurred. As Justice Blackmun noted in the concurring opinion: "We decide today that the Internal Revenue Service has statutory authority to issue a summons to a bank in order to ascertain the identity of a person whose transactions with that bank strongly suggest liability for unpaid taxes." ____U.S. ____, 43 L.Ed.2d at 96. (Emphasis supplied) There is no such suggestion in the instant case. There is nothing to suggest that there was any possible tax liability other than an agent's thwarted curiosity.

Not only was the summons issued in order to explore a third party's papers and without any reason to believe that a taxable incident or occurrence had transpired, but the summons was issued to

obtain papers which were already in the Commissioner's possession, papers which the IRS had made no attempt to obtain from its own files. The testimony of the only witness, the IRS agent issuing the summons, showed that the information initially sought, tax returns of the 32 randomly selected trusts, was already in the possession of the IRS and that no attempt had been made to obtain such information from the Services files or from any other source, prior to service of the summons on the Bank. (TR 30-31) This is directly in contravention of those cases, beginning with United States v. Powell, 379 U.S. 48 (1964), in which the Government has been required to show as part of its prima facie case for enforcement of a Section 7602 summons that the information sought by the summons is not already within the possession of the Commissioner. The IRS may not use the power to summons to obtain information which it has in its own files. E.g., United States v. McCarthy, 514 F.2d 308, 372-3 (3d Cir. 1975); United States v. Freedman, 388 F.Supp. 963, 969, 970 (W.D. Pa. 1975); United States v. Armour, 376 F.Supp. 318, 321 (D. Conn. 1974); United States v. Fisher, 352 F.Supp. 731, 733 (E.D. Pa. 1972); Slocum v. United States, 303 F.Supp. 373, 376 (D. Minn. 1969). The Courts have denied enforcement of a summons when the IRS already has the information sought in its possession, this fact bearing on the element of good faith in the investigation. E.g., United States v. Lubus, 370 F.Supp. 695, 701 (D. Conn. 1974).

Only two of the requirements set forth in United States v. Powell, and

none of the three factors emphasized in Bisceglia as showing a good faith investigation are present in the instant case. (1) There was no reasonable suspicion or basis on the part of the Internal Revenue Service agent to investigate customers of the taxpayer bank. Unlike Bisceglia, in which there was an act recognized for its suspicious nature, the only basis given for serving the summons in the instant case was that a bank, under audit, refused on principle to provide the names of a random sample of other taxpayers with whom it did business but for whom it had no tax liability. (2) There was no definite ongoing audit of the 32 taxpayers by the Internal Revenue Service prior to the time the summons was issued. (TR 13,25) The service of the summons was the only step taken to audit these entities. (3) The IRS had in its own files all records summoned and all records necessary to determine the tax liability of the 32 trusts. The IRS, however, made no effort to obtain this information from its own repository in advance of service of the summons. (TR 30-31) (4) Finally, the summons was to be used purely for an exploration of the bank files in the hope of obtaining information as to tax liability of third parties. As a matter of law, enforcement of the summons in this case should be refused.

CONCLUSION

There are substantial rights and interests involved in this case. The question of the circumstances under which the IRS may compel production of documents, particularly those of a fiduciary

institution which concern its customers, has never been clearly articulated. There comes a point at which the "investigating" administrative search becomes an arbitrary, random, exploratory search which plainly abuses the summons authority of Section 7602. This Court's opinion in Bisceglia, supra, has apparently raised just such questions in the minds not only of those whose records are being searched, but also within the IRS itself.

On May 8, 1975, the IRS issued a series of instructions to its field offices in an effort to spell out some internal controls. In a speech in Milwaukee before a meeting of Certified Public Accountants, Commissioner of Internal Revenue, Donald C. Alexander, said: "The new controls were ordered to insure that the IRS does not become involved in 'fishing expeditions' that are merely an invasion of taxpayers privacy." CCH Standard Federal Tax Reports, Paragraph 6585. On the other hand, on July 10, 1975, the American Banker reported that in a statement presented to the House Ways and Means Committee, William M. Horne, Jr., Chairman of the American Bankers Association Taxation Committee and Senior Vice President of the First National City Bank, urged the Congress to pass legislation limiting the IRS summons authority of bank records because "there are virtually no limitations on the authority" of the Service to see customer records. Implicit the statements of both men is the view that the power of the Internal Revenue Service to summon documents under Section 7602 is unlimited.

Petitioner seeks review by this Court because it believes the IRS is subject to constitutional restraint and that the power to issue and enforce a Section 7602 summons is still subject to the limitations of this Court as stated in the case law referenced above. The District Court granted and the Court of Appeals sustained enforcement of the summons because they felt it was based on a "good faith" audit. Petitioner has sought review by this Court because it strongly believes that "good faith" in the sense of the absence of a malicious intent, is not a constitutionally acceptable standard to permit a search of records, particularly records of a fiduciary institution. A summons issued by the Internal Revenue Service to obtain tax records from a third party without any other steps being taken to investigate the taxpayers, without any suspicion of a taxable incident having occurred and without any attempt to obtain the identical information from Internal Revenue Service files is not issued in "good faith". As a matter of law, a summons issued on this basis to explore the papers of a third party in the hope of finding tax liability of other persons should not be enforced.

Respectfully submitted,

J. THOMAS CARDWELL

J. Thomas Cardwell
Attorney for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA
and EDWARD P. CORY,
Revenue Agent, Internal
Revenue Service,

Petitioners,

vs. No. 73-321-ORL-CIV-Y

SUN FIRST NATIONAL BANK
OF ORLANDO and CLIFFORD
M. HAMES, Vice President
and Trust Officer,

Respondents.

ORDER

This cause came on before the Court for hearing on the Government's petition to enforce an Internal Revenue summons directed to Clifford M. Hames, Vice President and Trust Officer, Sun First National Bank of Orlando. The summons required Hames to produce certain documents in the Bank's possession relating to thirty-two (32) specific trust accounts in order that Internal Revenue agents could examine them to determine if all tax liabilities for the various trusts had been properly submitted to the Internal Revenue Service.

At the hearing Internal Revenue agent Edward P. Cory testified that the IRS had been conducting an audit of the First at Orlando Corporation, of which the Sun First National Bank of Orlando is a subsidiary. While conducting this audit, Agent Cory randomly selected the thirty-two (32) trust accounts in question from a group of approximately one hundred fifty (150) such trusts in order to ascertain if the interest equalization tax statute were applicable, and if so, whether such tax had been paid by each such trust. Pursuant to this aspect of the examination, Agent Cory requested the Bank to produce for his inspection the retained copies of Form 1041 (fiduciary income tax return) filed by the bank as Trustee for the thirty-two (32) specific trust accounts for the years 1970 and 1971. The bank, acting on advice of counsel, declined to comply with this request, and Agent Cory thereupon determined that an audit of the income tax liabilities of each of the individual trust accounts would be necessary. The summons in question was issued as a result of this determination by Agent Cory. The bank again declined to comply with the request by the agent. Information regarding the audit of these particular trust accounts and the bank's refusal to comply with the summons were thereupon forwarded to the Justice Department, Tax Division, where a decision was apparently reached to have the U.S. Attorney's Office seek to have the summons enforced against the Bank and Hames. This proceeding resulted.

After having considered the file and the briefs therein, as well as the testimony and argument of counsel at the hear-

ing, this Court concludes that a liberal interpretation is to be afforded the right of the Internal Revenue Service to secure documents such as those sought in this case. United States vs. Powell, 379 U.S. 48 (1964). In that case the majority permitted the IRS to secure the tax related documents sought even though the statute of limitations had run and there had been no showing of fraud such as would permit a recovery of a deficiency for years prior to the period specified in the statute of limitations. In addition, it was a second audit, but the Court found no abuse of the Court's process.

The Government need only show that good faith audit is under way as to the tax liability concerning which the documents are sought; the information sought must be likely to be relevant and material to the investigation under way. In this case the Court has heard the testimony of the agent concerning the audit and the representation of the Assistant U. S. Attorney that the Tax Division of the Justice Department has directed that enforcement of this summons be sought in the Courts. Consequently this Court concludes that there is a sufficient audit under way as to each of the trust accounts specified in the summons so as to permit these documents to be secured by the Internal Revenue Service. Upon consideration therefore, it is

ORDERED that the petition to enforce the Internal Revenue summons be and is hereby granted and Clifford M. Hames, Vice President and Trust Officer, Sun First National Bank of Orlando shall produce for examination by Internal Revenue Agent

Edward P. Cory the documents specified in the summons at issue, a copy of which is attached to the petition herein, such production shall be made at a place and time to be agreed upon by counsel; if such agreement cannot be reached within ten (10) days from date hereof, this Court, upon application by either party, will set by order a time and place.

DONE AND ORDERED in Chambers at Orlando, Florida, this 11th day of January, 1974.

/s/ George C. Young
Chief Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 74-1453

UNITED STATES of America and
Edward P. Cory, Revenue Agent,
Internal Revenue Service,

Petitioners-Appellees,

vs.

SUN FIRST NATIONAL BANK OF
ORLANDO and Clifford M. Hames,

Respondents-Appellants.

April 4, 1975

Before BELL, AINSWORTH and RONEY,
Circuit Judges.

RONEY, Circuit Judge:

Sun First National Bank of Orlando and Clifford M. Hames, its Vice President and Trust Officer, appeal from the district court's enforcement of a Section 7602 administrative summons of the Internal Revenue Service issued by Revenue Agent Edward P. Cory. We affirm.

The summons was issued in the matter of the tax liability of thirty-two named trusts handled by the bank's trust department and sought production of the following:

> "As to each of the Trusts set forth on the attached list for which the bank has fiduciary responsibilities,

the retained copy of Form 1041 (Fiduciary Income Tax Return) filed by the bank as trustee for the years 1970 and 1971; the trust declaration or instrument establishing or creating the trust; all records of income and disbursements of each trust; records in connection with the investment of trust funds; records of assets contributed to the trust; your Trust Committee minutes relevant to each trust; and the Employer Identification Number of each of the trusts."

The two questions raised by Sun on appeal from the judgment enforcing this summons are: first, whether an IRS summons seeking production of a random sample of records of a bank's trust accounts is authorized under 26 U.S.C.A. Sec. 7602 and second, whether an IRS summons seeking production of a random sample of records of a bank's trust accounts violates the Fourth Amendment. We limit our consideration of this case to these two attacks on the summons. The attacks fail because the facts as they appear in the record do not support the basic premise of arbitrariness implicit in the questions posed. Our affirmance of the enforcement, therefore, does not squarely confront the import of the questions.

Respondents' opposition to the summons is based on the factual situation in which it was issued. Early in 1973 the IRS undertook an audit of the consolidated income tax return for the First at Orlando Corporation, a bank holding company controlling thirty-seven banks with assets of over 1.7 billion dollars. As a part of

this larger audit Revenue Agent Edward P. Cory directed the audit of Sun First National Bank of Orlando, the lead bank of the holding company. Sun was very cooperative, providing free access to the IRS for most of its records including those records of its Trust Department which Sun considered relevant to the IRS review of First at Orlando's tax liability. The information provided which related to the Trust Department included data on its common trust fund, the minutes of the Trust Committee meetings, the tax identification numbers of certain accounts, records of the amount of income and expenses received by and incurred by Sun in managing the common trust fund, and other requested materials. It was only when Cory requested information concerning certain individual trusts that Sun balked at the IRS request.

Cory and his supervisor, prior to the beginning of the examination of Sun's records, had determined that in the Trust Department phase of the audit the IRS would examine the common trust fund and audit the interest equalization taxes reported by Sun, as fiduciary, in respect to the various trusts it managed. See Int.Rev.Code of 1954, Sections 4911-4920. From the information which the bank freely provided, Cory extracted the names of approximately 150 individual trusts. He then selected a random sample of these trusts for closer examination to evaluate Sun's performance of its duties to the IRS with respect to these trusts. The bank was requested to furnish Cory the bank's retained copy of the Form 1041 Fiduciary Income Tax Return of each of the thirty-two accounts. Sun offered, through its trust officer, Clifford M. Hames, to

provide copies of the requested returns with the top portions, containing the names of the trusts blanked out. This offer made Cory suspicious as to the accuracy of the fiduciary returns, and he decided, with the concurrence of his supervisor, to examine more closely these trusts and the data which the bank had to support its information returns. Accordingly, Cory served Hames with an IRS summons on May 14, 1973. The summons directed Hames to appear before Cory on May 29, 1973, to testify regarding the thirty-two trusts, and to bring with him, as to each trust for which Sun had fiduciary responsibilities the documents and records set forth.

After consulting with its legal counsel, Sun refused to obey the summons, asserting that the requested materials were not relevant to the ongoing audit of First at Orlando's consolidated return. Sun felt that its fiduciary relationship with the trusts impelled it to protect them and their beneficiaries from what it considered a "fishing expedition" by the IRS. After the case was reviewed by the Department of Justice at the request of the IRS, the United States sought enforcement of the summons in federal district court. See Int.Rev.Code of 1954, Section 7402(b).

The district court held a hearing on the motion for enforcement, at which only Agent Cory testified. The court found that there was underway a good faith audit of the tax liability of the trusts sufficient to justify enforcement of the summons, which sought information relevant to that investigation.

Our review requires us to accept the facts found by the district court unless clearly erroneous, under F.R.Civ.P. 52(a), and to review the court's compliance with the mandates of United States v. Powell, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964) and United States v. Bisceglia, ___ U.S. ___, 95 S.Ct. 915, 42 L.Ed.2d ___ (1975). Once a summons is challenged it must be scrutinized by a court to determine whether it seeks information relevant to a legitimate investigatory purpose and is issued in good faith. This is the precise scrutiny that was afforded by the district court. Agent Cory testified that:

> "The purpose of this specific summons is to secure information to determine that all appropriate tax returns were filed by these 32 trusts to determine also that the tax liability on these trusts had been properly computed and to secure information pertaining to the assets, so if there is any tax liability, unpaid tax liability, we would be able to secure payment."

Upon further examination of the witness, an exchange over the Government's objection to the scope of cross-examination brought the following comment from the respondents' attorney:

> "MR. CARDWELL: Your Honor, this is one of the points of great confusion to me as to whether in fact this whole thing started out, whether they are auditing the bank for purposes of determining whether there is any income tax liability on the part of the bank or whether, in fact, the govern-

ment is seeking pursuant to some independent investigation of some other question in the context of this audit, get hold of these fiduciary records in the bank. As the Court may recall from my memorandum, I raised that question. That, of course, is the purpose of the last question of Mr. Cory to try to shed some light on that."

Thereupon the court overruled the objection stating that "I think the Court has the obligation to find out all the facts." To this end the Court recalled the witness and had this exchange:

"THE COURT: In connection with these 32 trust accounts, is there anything else being done by the Internal Revenue Service to audit any of these accounts other than your seeking to get these documents?

"THE WITNESS: To my knowledge there is no other assignment except to me. Now, I have been assigned the responsibility of examining these entities for income tax and other liabilities. They have assigned it to me, Sir.

"THE COURT: Are you investigating the individual tax returns of any of the beneficiaries of these trusts?

"THE WITNESS: At this time, no, Sir.

"THE COURT: None has been authorized?

"THE WITNESS: Not at this time, Sir.

"THE COURT: Well, if a person is a beneficiary of a trust and gets income from a trust in order to be able to fully ascertain if such person owed any income tax to the government, wouldn't the government have to take into consideration the person's income outside of the trust, the income as well as that that might be received from the trust?

"THE WITNESS: Yes, but in this aspect we are examining the income tax liability of the trust and we are also examining any information returns that the trust might be required to file showing the taxable portions to the beneficiaries. To this extent we would not need to see the beneficiaries' tax return or contact them. We would be there verifying that the records of the trust agree with the information returns and the returns filed with us.

"THE COURT: You are seeking just to audit what, if any, income tax is owed by the trust itself as distinguished from the beneficiary?

"THE WITNESS: At this time, yes, Sir."

The respondents made no attempt to narrow the scope of the summons as it applied to the trusts, offered no witnesses or other evidence bearing on the Government's purpose, and offering only a broad attack

against the entire summons. Whereupon the court correctly stated its responsibility and made its findings of fact, as follows:

> "I believe all the government has to show is that there is a good faith audit under way as to the documents, which is under way as to the tax entity concerning which the documents are sought and that the documents sought must be - - - the information must be relevant and material or likely to be relevant and material. The good faith of the audit of these individuals accounts is subject to some suspect in view of the way in which it arose and it portends some apprehension as to such tactics, where they are resorted to because of an apparent dissatisfaction with the party seeking to stand on his rights, but apparently, as this case reaches this Court, there is sufficient audit under way as to each of these accounts which would permit these records and documents, the information to be secured because not only is there the testimony of the agent, but the government has represented that this matter has been reviewed by the Treasury and the Department of Justice which carries with it to me evidence that there has been more than one agent's desire to secure this information, but I again say that audits ought to be instigated for more reason that dissatisfaction with the fact that a person or entity has required the government to seek from its own records documents which it has or should have.

"So, I will require the enforcement of the summons of those comments." (emphasis added).

We find no error. Based on the district court's finding that there was a good faith audit of the trusts underway and that the documents sought were relevant to that investigation, we affirm. We express no view on whether the documents would have been properly subject to summons if the only ongoing investigation was of Sun. Compare United States v. Humble Oil & Refining Co., 488 F.2d 953 (5th Cir. 1974), cert. applied for 43 U.S.L.W. 3079 (U.S. June 4, 1974) (No. 73-1827), with United States v. Carter, 489 F.2d 413, reh. denied, 504 F.2d 428 (5th Cir. 1974); see United States v. Bisceglia, ___ U.S. ___, 95 S.Ct. 915, 42 L.Ed.2d...(1975).

This Court has consistently upheld otherwise valid Internal Revenue summonses against Fourth Amendment challenge. United States v. Roundtree, 420 F.2d 845 (5th Cir. 1969).

Affirmed.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

May 16, 1975

TO ALL COUNSEL OF RECORD

No. 74-1453 - U. S. A. and Edward P. Cory, Etc. vs. Sun First National Bank of Orlando and Clifford M. Hames

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By Barbara Krei
Deputy Clerk

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

(Sec. 7601(a))

(a) GENERAL RULE.--The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

(Sec. 7601(b))

(b) PENALTIES.--

For penalties applicable to forcible obstruction or hindrance of Treasury officers or employees in the performance of their duties, see section 7212.

(Sec. 7602)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any

internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized--

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies hereof have been furnished by United States mail, postage prepaid, this 13th day of August, 1975 to the following: Harrison Slaughter, Assistant United States Attorney, Post Office Box 2593, Orlando, Florida 32802; Scott P. Crampton, Assistant Attorney General, Tax Division, Department of Justice, Washington, D. C. 20530; and the Solicitor General, Department of Justice, Washington, D. C. 20530.

J. THOMAS CARDWELL

J. Thomas Cardwell, of
AKERMAN, SENTERFITT, EIDSON & WHARTON
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P.O. Box 231
Orlando, Florida 32802

Of Counsel for Petitioners

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-234

SUN FIRST NATIONAL BANK OF ORLANDO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek review of the decision below enforcing an Internal Revenue summons requiring production of copies of tax returns of trusts of which petitioner-bank was trustee.

The pertinent facts are as follows: During the course of an Internal Revenue Service examination of petitioner-bank, the revenue agent requested that the bank produce its retained copies of income tax returns of 32 trusts filed by the bank as trustee.

The agent had become suspicious that returns for some trusts might not have been filed when he was informed that, while returns would be provided, all information identifying the particular trust would be deleted (Pet. App. A-7 to A-8). The agent commenced an audit of each trust for the purpose of ascertaining whether its tax liabilities had been correctly reported. Pursuant to these investigations, he issued a summons for the retained tax returns and records pertaining to the trusts. The petitioner-bank refused to produce the summonsed records. In this enforcement proceeding, the district court enforced the summons (Pet. App. A-1 to A-4), and the court of appeals affirmed (Pet. App. A-5 to A-13).

Petitioners contend (Pet. 14, 16) that enforcement of the summons was improper because the summons was issued "in order to explore a third party's papers" and "[t]here was no definite ongoing audit of the 32 taxpayers * * * prior to the time the summons was issued." However, these assertions are contradicted by the district court's findings, affirmed by the court of appeals, that the Service was conducting an audit of each trust (see Pet. App. A-12). The tered by petitioner-bank, and these trusts, not their beneficiaries, were the subjects of the audits. Although petitioners complain that the 32 trust accounts had been selected at random from a list of 150, the random selection of taxpayers to be audited, together with the random selection of items on returns for further examination, is a method which the Internal

Revenue Service has long utilized in order to enforce the tax laws.

Petitioners further argue (Pet. 14) that the Internal Revenue Service cannot have its summonses enforced unless it shows that "there was a substantial reason to believe that a taxable incident had occurred." This Court, however, rejected a similar contention in *United States* v. *Powell*, 379 U.S. 48, 57, where it observed that the Commissioner "can investigate merely on suspicion that the law is being violated, or even just because [he] wants assurance that it is not." Moreover, in *United States* v. *Bisceglia*, 420 U.S. 141, the Court reaffirmed its rejection of any "probable cause [requirement], in the traditional sense," stating that "[t]he purpose of the statutes is not to accuse, but to inquire" (420 U.S. at 146). Here, the agent testified that he became suspicious that returns required by law to be filed had not been filed and that he then commenced his investigations (R. A-48).[1] The decision below ordering enforcement of the summons is therefore entirely in accord with *Powell* and *Bisceglia*.[2]

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[1] "R." references are to the record appendix filed in the court of appeals.

[2] Petitioners also contend (Pet. 14-15) that the enforcement was improper because the Service had not attempted to obtain the returns from its files. The agent testified (R. A-45), however, that he had not been able to obtain a number of the returns. Furthermore, the summons also required production of trust instruments, records of income and disbursements and other bank documents relating to the trusts, which were not in the possession of the Service. (R. A-6).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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